

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOSE NUNO,
Defendant.

Case No. 10-cr-00301-BLF-2

**ORDER DENYING DEFENDANT'S
REQUEST FOR TRANSCRIPTS FREE
OF COST**

[Re: ECF 389]

Defendant Jose Nuno, proceeding pro se, has filed a motion seeking "Permission to Recieve [sic] Sentencing and/or Plea Agreement Transcript for Free of Cost." Def.'s Mot., ECF 389. The motion is DENIED for the reasons discussed below.

I. BACKGROUND

In 2011, Nuno pled guilty to the offenses of Conspiracy to Distribute Over 50 grams of Methamphetamine in violation of 21 U.S.C. § 846 and Possession with Intent to Distribute Over 50 grams of Methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). Plea Agreement, ECF 185; Minute Entry, ECF 190. Nuno was convicted pursuant to his plea and sentenced to the statutory mandatory minimum term of 120 months imprisonment for each offense, the sentences to run concurrently. Judgment, ECF 250 (imposing 120 months total term of imprisonment); 21 U.S.C. § 841(b)(1)(A)(viii) (statutory mandatory minimum of 10 years for possession with intent to distribute); 21 U.S.C. § 846 (same penalty for conspiracy to distribute as possession with intent to distribute).

On November 1, 2014, the United States Sentencing Commission issued Amendment 782 to its Sentencing Guidelines, which lowered the recommended sentences for certain drug crimes by reducing by two levels the base offense levels in the Drug Quantity Tables at U.S.S.G. §§ 2D1.1 and 2D1.11. U.S.S.G., sup. app'x C, amend. 782 (2014); *United States v. Navarro*, 800 F.3d 1104, 1107 (9th Cir. 2015).

1 In 2015, Nuno filed a Pro Se Motion for Modification of Sentence, seeking a reduction of
2 his sentence pursuant to Amendment 782 and 18 U.S.C. § 3582(c)(2). Def.'s Pro Se Motion for
3 Modification of Sentence, ECF 320. Section 3582(c)(2) provides as follows:

4 in the case of a defendant who has been sentenced to a term of imprisonment based
5 on a sentencing range that has subsequently been lowered by the Sentencing
6 Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the
7 Director of the Bureau of Prisons, or on its own motion, the court may reduce the
term of imprisonment, after considering the factors set forth in section 3553(a) to
the extent that they are applicable, if such a reduction is consistent with applicable
policy statements issued by the Sentencing Commission

8 18 U.S.C. § 3582(c)(2). This Court denied Nuno's Pro Se Motion for Modification of Sentence by
9 written order filed June 1, 2015 and served on Nuno by mail the same date. Order Denying
10 Motion for Modification of Sentence, ECF 339. The Court concluded that Nuno was not eligible
11 for a reduction in sentence because his original sentence of 120 months was the statutory
12 mandatory minimum. *Id.* A defendant is not eligible for a sentence reduction under § 3582(c) if
13 he was sentenced to pursuant to a statutory mandatory minimum term of imprisonment. *United*
14 *States v. Paulk*, 569 F.3d 1094, 1096 (9th Cir. 2009).

15 On August 2, 2016, Nuno filed the present motion seeking "Permission to Recieve [sic]
16 Sentencing and/or Plea Agreement Transcript for Free of Cost." Def.'s Mot., ECF 389. Nuno
17 states that he intends to file a petition for a two-point sentence reduction under Amendment 782
18 and § 3582, and that the transcripts of his sentencing and plea agreement proceedings "will aide
19 [sic] Mr. Nuno in submitting a factual based petition to this court." *Id.* The present motion does
20 not acknowledge Nuno's prior unsuccessful motion for a modification of sentence under
21 Amendment 782 and § 3582.

22 II. DISCUSSION

23 Nuno cites no statutory basis for his request to receive transcripts of court proceedings free
24 of cost. He relies on a 1972 Fourth Circuit case holding that a prisoner has a constitutional right to
25 obtain transcripts at the government's expense if the prisoner shows that the transcripts are needed
26 to collaterally attack a conviction. *See Jones v. Superintendent, Virginia State Farm*, 460 F.2d
27 150, 153 (4th Cir. 1972). The Fourth Circuit held that "if no need is shown, there is no
28 constitutional right to a transcript, regardless of how easily and inexpensively the state could

1 furnish it.” *Id.*

2 *Jones* is not directly on point, as Nuno has not indicated that he wishes to collaterally
 3 attack his conviction but only that he wishes to seek a reduction of his sentence. Moreover, four
 4 years after *Jones*, the United States Supreme Court held that that “Congress has expressly
 5 addressed the question of furnishing transcripts at public expense in 28 U.S.C. § 753(f).” *United*
 6 *States v. MacCollom*, 426 U.S. 317, 320 (1976). Section 753(f) provides as follows:

7 Each reporter may charge and collect fees for transcripts requested by the parties,
 8 including the United States, at rates prescribed by the court subject to the approval
 9 of the Judicial Conference. He shall not charge a fee for any copy of a transcript
 10 delivered to the clerk for the records of court. Fees for transcripts furnished in
 11 criminal proceedings to persons proceeding under the Criminal Justice Act
 12 (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue,
 13 defend, or appeal in forma pauperis, shall be paid by the United States out of
 14 moneys appropriated for those purposes. Fees for transcripts furnished in
 15 proceedings brought under section 2255 of this title to persons permitted to sue or
 16 appeal in forma pauperis shall be paid by the United States out of money
 17 appropriated for that purpose if the trial judge or a circuit judge *certifies that the*
 18 *suit or appeal is not frivolous* and that the transcript is needed to decide the issue
 19 presented by the suit or appeal. Fees for transcripts furnished in other proceedings
 20 to persons permitted to appeal in forma pauperis shall also be paid by the United
 21 States if the trial judge or a circuit judge *certifies that the appeal is not frivolous*
 22 (but presents a substantial question). The reporter may require any party requesting
 23 a transcript to prepay the estimated fee in advance except as to transcripts that are
 24 to be paid for by the United States.

25 28 U.S.C. § 753(f) (emphasis added). In brief, the statute permits court reports to charge all
 26 parties for transcripts except under specified circumstances in which the transcripts will be
 27 provided at the United States’ expense. The statute explains the requirements for obtaining
 28 transcripts free of charge in proceedings under the Criminal Justice Act, habeas proceedings,
 proceedings under 28 U.S.C. § 2255, and “other proceedings to persons permitted to appeal in
 forma pauperis.” *Id.* The Supreme Court held that the imposition of the above requirements on
 prisoners seeking transcripts at the United States’ expense did not violate the United States
 Constitution. *MacCollom*, 426 U.S. at 324, 328.

None of the proceedings listed in § 753(f) is a precise fit here, as Nuno seeks transcripts in
 order to aid him in filing a motion under § 3582(c). However, even if this Court were to conclude
 that a § 3582(c) motion is sufficiently analogous to a § 2255 motion to confer upon it discretion to
 grant Nuno’s request for transcripts, such discretion would be limited by the statutory requirement

that the Court certify that the proceeding for which transcripts are requested is not frivolous. As discussed above, Nuno previously moved for a reduction in sentence under Amendment 782 and 18 U.S.C. § 3582(c), and the Court determined that he is not eligible for a reduction under those provisions because he was sentenced to the statutory mandatory minimum. Any motion repeating the prior request for a reduction in sentence under Amendment 782 and 18 U.S.C. § 3582(c) would be frivolous.

III. ORDER

- (1) Nuno's motion seeking "Permission to Recieve [sic] Sentencing and/or Plea Agreement Transcript for Free of Cost," ECF 389, is DENIED; and
- (2) The Clerk shall serve Nuno with copies of (a) this Order; (b) the Court's prior Order Denying Motion for Modification of Sentence, ECF 339; (c) Nuno's Plea Agreement, ECF 185; and the Judgment in this case, ECF 250.

Dated: August 11, 2016


BETH LABSON FREEMAN
United States District Judge